

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 20, 2006

FRANK E. HUEY v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 98-D-2428 Cheryl Blackburn, Judge**

No. M2005-01490-CCA-R3-PC - Filed January 30, 2007

The petitioner, Frank E. Huey, appeals his denial of post-conviction relief by the Criminal Court of Davidson County. On appeal, he contends that he was denied effective assistance of counsel because: (1) trial counsel did not call the petitioner's mother to testify at trial; (2) trial counsel failed to have the petitioner evaluated for competency prior to trial; and (3) trial counsel refused to allow the petitioner to testify on his own behalf. The State argues that the petitioner received effective assistance on all counts and that this appeal should be dismissed because the petitioner did not timely file his notice of appeal. After careful review, we conclude that the petitioner did receive effective assistance of counsel, and we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Mark A. Kovach, Nashville, Tennessee, for the appellant, Frank E. Huey.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Roger D. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The petitioner was charged with one count of first degree murder, two counts of attempted first degree murder, one count of aggravated assault, and one count of felony reckless endangerment. After being convicted by a Davidson County jury of one count of facilitation of first degree murder, two counts of aggravated assault, and one count of felony reckless endangerment, he received an effective sentence of fifty-one years.

On direct appeal, a panel of this court affirmed the petitioner's convictions and sentences. See State v. Frank E. Huey, No. M2000-02793-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 313, at *11, (Tenn. Crim. App. at Nashville, Apr. 5, 2002). This court, on appeal, summarized the evidence against the petitioner as follows:

The evidence against Defendant Huey showed that on the day of the shooting he, accompanied by his codefendants, entered Jerome Jones' house. Defendant Huey then struck Mr. Jones with a pistol, left the house, and fired the pistol into the air. Later that evening, several witnesses observed Defendant Huey and his codefendants approach Mr. Jones' apartment, position themselves strategically around the apartment, and open fire on the group standing in front of the apartment which included Mr. Jones, Ben White, and Leo White. Defendant Huey was armed with a rifle. The crowd around the porch ran for cover. However, Ben and Leo White were both shot, and Ben White died from his injuries. The State's medical examiner testified that Ben White died as a result of blood loss due to two gunshot wounds. Detective Kent McAllister testified that medical personnel trying to save the life of Ben White gave him a bullet retrieved from Ben White's body. Tennessee Bureau of Investigation ballistics expert Steve Scott identified that bullet as being fired from a rifle.

Id.

The petitioner subsequently filed a petition for post-conviction relief which was denied by the post-conviction court, and this appeal followed.

Analysis

Initially, we note that the State has argued that the petitioner's notice of appeal was not timely. The State contends that the petitioner did not file his notice of appeal until 35 days after the trial court filed its order. Under the Tennessee Rules of Appellate Procedure, an appellant has 30 days from the trial court's order dismissing a post-conviction petition in which to file a timely notice of appeal. Tenn. R. App. P. 4(a). Here, the trial court's order was filed May 20, 2005, and the petitioner's notice of appeal was not filed until June 24, 2005. However, this court, in the interest of justice may waive the 30-day filing requirement. We do so in this case and address the petitioner's issues on the merits.

The petitioner, claiming trial counsel was ineffective, argues that the post-conviction court erred by denying his petition for post-conviction relief. Since the petitioner alleged ineffective assistance of counsel, it is his burden in the post-conviction court to prove the allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). We are required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

In order to prove ineffective assistance of counsel, the petitioner must prove that (1) counsel's performance was deficient, and (2) the deficiency was prejudicial in terms of rendering a

reasonable probability that the result of the trial was unreliable or the proceedings were fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The Tennessee Supreme Court has also applied this standard to the right to trial counsel under Article I, section 9 of the Tennessee Constitution, State v. Melson 772 S.W.2d 417, 419 n.2 (Tenn. 1989), and to the right to counsel on direct appeal under the Fourteenth Amendment. Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995).

For a petitioner to successfully overturn a conviction based on ineffective assistance of counsel, the petitioner must first establish that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Second, the petitioner must show that the deficiencies “actually had an adverse effect on the defense.” Strickland, 466 U.S. at 693.

The petitioner is not entitled to the benefit of hindsight; the petitioner may not second-guess a reasonably-based trial strategy; and the petitioner may not criticize a sound, but unsuccessful, tactical decision made after adequate preparation for the case. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

On appeal, the petitioner contends that he received ineffective assistance of trial counsel, raising three specific areas to support his argument. First, he alleges that trial counsel failed to adequately prepare for trial and specifically argues that, had counsel been more prepared, he would have called the petitioner’s mother to testify as an alibi witness. He contends that the absence of the mother’s testimony prejudiced him and states that he would have been acquitted by her testimony. However, the petitioner failed to call his mother as a witness during the post-conviction proceeding. “When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990); see also Scott v. State, 936 S.W.2d 271, 273 (Tenn. Crim. App. 1996). As a general rule, this is the only way the petitioner can establish that: (1) a material witness existed who could have been discovered but for counsel’s negligent investigation of the case; (2) a known witness was not interviewed; (3) the failure to discover or interview the witness caused him prejudice; or (4) the failure to present a known witness resulted in the denial of critical evidence which caused the petitioner prejudice. Black, 794 S.W.2d at 757. Neither the trial court nor this court can speculate on what a witness’s testimony might have been if introduced by counsel. Id. Here, the petitioner failed to present his mother to testify and, therefore, this issue is without merit.

Next, the petitioner contends that counsel failed to have him evaluated to determine whether he was competent to stand trial. However, the petitioner has failed to provide any evidence to demonstrate that he was not competent. The post-conviction court found that the petitioner presented no medical evidence to prove he suffers from any mental illness and, further, that he demonstrated his competency by testifying that he understood the offense he was charged with at the time of his trial and that he knew the role of the court and all the court participants. Further, trial counsel testified that the petitioner was able to help with his defense and always understood what

was happening with his case. The post-conviction court found, and we agree, that the petitioner has failed to establish by clear and convincing evidence that trial counsel was ineffective for not requesting a mental evaluation.

Finally, the petitioner contends the post-conviction court erred when ruling he was not prevented from testifying on his own behalf. The post-conviction court found that counsel never told the petitioner that he could not testify. At the post-conviction hearing, the petitioner conceded that he knew he had the right to testify and followed trial counsel's advice not to testify because it would open the door to his past criminal history. The post-conviction court found that the petitioner did not establish by clear and convincing evidence that trial counsel was ineffective or that counsel prevented him from testifying. Further, the post-conviction court stated that it thoroughly informed the petitioner at trial that it was his sole decision whether to testify. The court thoroughly examined the petitioner as to his wishes; he waived his right to testify and signed a waiver to memorialize his decision. We conclude that the petitioner has failed to establish that he did not voluntarily waive his right to testify. He executed a waiver of right to testify form and verbally informed the trial court that it was his decision to decline to testify. This issue lacks merit, and the decision of the post-conviction court is affirmed.

Conclusion

Based on the foregoing and the record as a whole, we affirm the denial of relief from the post-conviction court.

JOHN EVERETT WILLIAMS, JUDGE